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4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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7 LA VELDA SINGLETON d.b.a. LOVE AND No. C 08-1852 CW
CARE PRESCHOOL,
8 Plaintiff,
9 v.
10 TRAVELERS INDEMNITY COMPANY OF ORDER GRANTING
CONNECTICUT, et al., DEFENDANT'S MOTION
11 Defendants. DENYING WITHOUT
12 PREJUDICE
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14 _____/
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16 Plaintiff La Velda Singleton has filed a motion to remand this
17 case to Alameda County Superior Court. Defendant Travelers
18 Indemnity Company of Connecticut opposes the motion and has filed a
19 motion to dismiss. The motions were taken under submission on the
20 papers. Having considered all of the parties' papers, the Court
21 grants Plaintiff's motion and denies Defendant's motion without
22 prejudice.

23 BACKGROUND
24 The following facts are alleged in the complaint. Plaintiff
25 is the owner of the building located at 8010 Holanda Lane in
26 Dublin, California. Plaintiff is also the proprietor of Love and
27 Care Preschool, which she operated at the Dublin property. On
28 November 17, 2004, a fire damaged the building and its contents,

1 rendering it uninhabitable and unfit for use as a preschool.

2 At the time of the fire, Plaintiff carried an insurance
3 policy, written by Defendant Travelers, that covered the building,
4 its contents and the loss of income and extra expense that might be
5 sustained if a covered peril made the insured building
6 uninhabitable. Plaintiff obtained the Travelers policy, and had
7 since 1982 obtained all of her property insurance, through
8 Defendant Uren Harrison Kennedy Insurance Agency (Uren), a
9 California corporation that acted as Travelers' agent. Plaintiff
10 alleges that at the time she obtained the insurance for the
11 building, "and at various times there after [sic], the agents,
12 employees, officers and representatives of Uren stated that they
13 had the skill, experience and expertise to obtain the kind and the
14 amount of insurance that Plaintiff would need to protect her
15 interests." Complaint ¶ 11. Moreover, Plaintiff alleges that,
16 from 1982 to the time of the fire, Uren "routinely inspected and
17 considered the insurance needed for the insured building, its
18 contents and a potential interruption in Plaintiff's preschool
19 should the insured building become uninhabitable." Id. at ¶ 12.

20 Plaintiff alleges that she and Defendants Uren and Travelers
21 "agreed that the written policy of insurance to be issued would
22 protect the Plaintiffs['] financial interests should an insured
23 peril cause the complete loss of the building and content [sic] and
24 rendered [sic] the building uninhabitable." Id. at ¶ 17.
25 Plaintiff refers to this as "the 'Agreement' between the parties."
26 Id.

27 However, Plaintiff alleges that after the fire, Defendants
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1 Uren and Travelers

2 claimed that their liability to Plaintiffs [sic] was
3 limited to the terms set forth in Travelers' and Does
4 1-30's written policy of property insurance, but unlike
5 the Agreement . . . the policy of property insurance
6 issued by Travelers and Does 1-30 did not provide the
promised coverage for the insured building, its
contents or provide for loss of income and extra
expense incurred because the insured building became
uninhabitable.

7 Id. at ¶ 19. After the fire, Plaintiff provided Travelers with
8 prompt notice of the loss and damage.

9 Based on these allegations, Plaintiff brings claims against
10 Travelers for reformation of the property insurance policy, breach
11 of the insurance policy, breach of the covenant of good faith and
12 fair dealing, fraud and negligent misrepresentation. Plaintiff
13 also states a claim for negligence against Uren and Travelers.

14 In addition, Plaintiff alleges various claims based on
15 Travelers' handling of her claim following the fire and the
16 reconstruction of her building. Plaintiff states an intentional
17 infliction of emotional distress claim against Allyson Delgado, the
18 claims administrator assigned to Plaintiff's claim. Plaintiff
19 alleges that Delgado "earned salary, bonuses, and benefits based on
20 her ability to undermine, discredit, and destroy policyholders'
21 legitimate claims so that Travelers and Does 1-30 could avoid their
22 obligations under their policies of insurance." Id. at ¶ 64.
23 Next, Plaintiff alleges that the contractors and engineers hired by
24 Travelers to assess the damage to her property, Defendants Chris
25 Morton, Hohback-Lewin Inc., Isam Hasenin, Murat Zilink and Walter
26 Springs Construction (Construction and Engineering Defendants),
27 knowingly wrote reports based on "direction from Travelers'"

1 personnel as to the conclusion that there [sic] reports should
2 reach." Id. at ¶ 99. Therefore, she alleges that the Construction
3 and Engineering Defendants are liable for civil aiding and abetting
4 for assisting Travelers in breaching the covenant of good faith and
5 fair dealing.

6 Finally, Plaintiff alleges that Textron Financial and Bank of
7 the West (Creditor Defendants) improperly applied the proceeds of
8 Plaintiff's insurance claim to the outstanding loan balance on her
9 mortgage on the property. Plaintiff alleges that she forwarded the
10 check from Travelers to the Creditor Defendants "to hold in a
11 separate account to be used to repair and replace the insured
12 dwelling." Id. at 115. Therefore, Plaintiff brings a claim for
13 breach of contract and breach of the covenant of good faith and
14 fair dealing against the Creditor Defendants.

15 On February 19, 2008, Plaintiff filed her complaint in Alameda
16 County Superior Court and served it on Defendant Travelers. On
17 April 7, 2008, Travelers filed a notice of removal, arguing that
18 this Court has diversity jurisdiction over the case. On April 9,
19 2008, Plaintiff filed in the state court proofs of service
20 indicating that, on March 22, 2008, Defendants Hasenin, Hohback-
21 Lewin, Morton, Uren and Walter Springs Construction had been
22 served.

23 DISCUSSION

24 A defendant may remove a civil action filed in state court to
25 federal district court so long as the district court could have
26 exercised original jurisdiction over the matter. 28 U.S.C.
27 § 1441(a). If at any time before final judgment it appears that
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1 the district court lacks subject matter jurisdiction over a case
2 previously removed from state court, the case must be remanded. 28
3 U.S.C. § 1447(c). On a motion to remand, the scope of the removal
4 statute must be strictly construed. Gaus v. Miles, Inc., 980 F.2d
5 564, 566 (9th Cir. 1992). "The 'strong presumption' against
6 removal jurisdiction means that the defendant always has the burden
7 of establishing that removal is proper." Id. Courts should
8 resolve doubts as to removability in favor of remanding the case to
9 state court. Id.

10 District courts have original jurisdiction over all civil
11 actions "where the matter in controversy exceeds the sum or value
12 of \$75,000, exclusive of interest and costs, and is between
13 . . . citizens of different states." 28 U.S.C. § 1332(a). When
14 federal subject matter jurisdiction is predicated on diversity of
15 citizenship, complete diversity must exist between the opposing
16 parties. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365,
17 373-74 (1978).

18 A defendant may remove a case lacking complete diversity and
19 seek to persuade the district court that any non-diverse defendant
20 was fraudulently joined. See McCabe v. Gen. Foods Corp., 811 F.2d
21 1336, 1339 (9th Cir. 1987). "If the plaintiff fails to state a
22 cause of action against a resident defendant, and the failure is
23 obvious according to the settled rules of the state, the joinder of
24 the resident defendant is fraudulent." Id. at 1339. The defendant
25 need not show that the joinder of the non-diverse party was for the
26 purpose of preventing removal. Instead, the defendant must
27 demonstrate that there is no possibility that the plaintiff will be
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1 able to establish a cause of action in state court against the
2 alleged sham defendant. See id.; Ritchey v. Upjohn Drug Co., 139
3 F.3d 1313, 1318 (9th Cir. 1998). For purposes of deciding a motion
4 for removal, "[t]he Court may look beyond the pleadings and
5 consider affidavits or other evidence to determine if the joinder
6 was a sham." Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068
7 (9th Cir. 2001).

8 Defendant Travelers argues that complete diversity exists here
9 because it is a Connecticut corporation, Textron is a Rhode Island
10 Corporation and the complaint does not state a claim against
11 Delgado, Uren, the Construction and Engineering Defendants or Bank
12 of the West. Because Plaintiff has stated a cause of action
13 against Uren, complete diversity does not exist and this case must
14 be remanded to the state court.

15 As described above, Plaintiff's complaint includes a
16 negligence claim against her insurance agent, Uren. The complaint
17 alleges that Uren "failed to exercise reasonable care in
18 determining the necessary kinds and amounts of insurance needed to
19 protect Plaintiff's financial interest in the insured building, its
20 contents[,] the potential loss of earnings and extra expenses."
21 Complaint ¶ 83. As Travelers concedes, "the law recognizes a cause
22 of action for professional negligence against an insurance broker
23 who fails to secure requested coverage." Opposition at 9; see Free
24 v. Republic Ins. Co., 8 Cal. App. 4th 1726, 1729-30 (1992).

25 Here, Plaintiff alleges that Uren represented to her that it
26 "had the skill, experience and expertise to obtain the kind and
27 amount of insurance that Plaintiff would need to protect her

1 interests against physical loss which might occur to the insured
2 building, its contents and for the interruption of her business
3 that might arise should the insured building become uninhabitable."
4 Complaint ¶ 75. Moreover, Plaintiff alleges that Uren "routinely
5 inspected the insured building, its contents and considered the
6 potential loss of income and extra expense that might occur should
7 a covered peril render the insured building uninhabitable." Id. at
8 ¶ 76. Contrary to Travelers' argument, Plaintiff's negligence
9 claim extends beyond "code upgrade coverage."

10 Travelers also argues that any negligence claim against Uren
11 is barred by the two-year statute of limitations. See Cal. Code.
12 Civ. P. § 339(1); Hydro-Mill Co., Inc. v. Hayward, Tilton and
13 Rolapp Ins. Assocs. Inc., 115 Cal. App. 4th 1145, 1155 (2004).
14 Travelers bases this argument on an assumption that the claim
15 accrued on November 17, 2004, the date of the fire. However, there
16 is nothing in the record to demonstrate that Plaintiff had reason
17 to believe that her losses were not covered on the date they
18 occurred.

19 To determine its jurisdiction, the Court need not decide
20 whether Plaintiff can prove a legally cognizable claim against
21 Uren, but need only conclude that she has plead one under state
22 law. Briqgs v. Lawrence, 230 Cal. App. 3d 605, 610 (1991). It is
23 Travelers' burden to demonstrate that there is no possibility that
24 Plaintiff will be able to establish a cause of action against Uren
25 in state court. With all reasonable inferences drawn in
26 Plaintiff's favor, she has alleged a timely claim for negligence
27 against Uren. Thus, while it remains to be seen whether Plaintiff

1 will be able to prevail on such a claim, the Court cannot conclude
2 that there is no possibility that she will. Accordingly, Travelers
3 has not met its heavy burden of establishing that this Court has
4 removal jurisdiction.

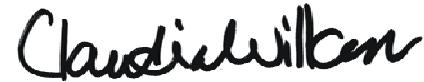
5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS Plaintiff's motion
7 to remand this action to state court (Docket No. 13). Because the
8 Court lacks subject matter jurisdiction over this case, it is
9 without power to adjudicate Travelers' motion to dismiss (Docket
10 No. 5). Therefore, that motion is DENIED WITHOUT PREJUDICE to
11 re-filing it in the state court proceedings. The clerk shall close
12 the file. Each party shall bear its own costs.

13 IT IS SO ORDERED.

14 6/27/08

15 Dated: _____



CLAUDIA WILKEN
United States District Judge

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